SYLLABUS

FEDERAL COURT JURISDICTION

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TABLE OF CONTENTS

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I. INTRODUCTION

The federal courts, like any other court, have the power to adjudicate only those matters and bind only those persons over which they have jurisdiction. The subject matter jurisdiction of federal courts is tightly circumscribed, distinguishing them from state courts of general jurisdiction. The limits of personal or *in personam* jurisdiction are measured by due process considerations under the United States Constitution, and, with some exceptions, are the same for state and federal courts.

II. SUBJECT MATTER JURISDICTION

A. The Basic Grant - U.S. Constitution, Article III

Article III of the Constitution provides that "the judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It goes on to prescribe the limits of federal judicial power which can be generally stated as (i) cases arising under the constitution and laws of the United States and (ii) cases which involve particular categories of parties, e.g., diversity of citizenship. The federal courts are thus courts of limited jurisdiction; a specific source of jurisdiction must be found in federal statutes. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Bowman v. White*, 388 F.2d 756 (4th Cir. 1968).

B. Statutory Bases of Jurisdiction

Article III of the Constitution defines the constitutional extent of jurisdiction that may be granted to courts established under that article. The only court created by the Constitution is the Supreme Court. Establishment of the federal judiciary and the system of district courts and courts of appeals and the actual endowment of federal courts with jurisdiction is the realm of the legislature. Congress first acted under Article III with the Judiciary Act of 1789. That legislation limned the structure and jurisdictional limits of federal courts that have existed ever since.

Subject matter jurisdiction is an element of the plaintiff's case in federal court. The facts giving rise to federal jurisdiction must be alleged in the complaint. Fed. R. Civ. P. 8(a).; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). A party asserting a claim in federal court has the burden of proving jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). Federal jurisdiction cannot be achieved by agreement, and its absence cannot be waived. *People's Bank v. Calhoun*, 102 U.S. (12 Otto) 258 (1880). Absence of jurisdiction may be raised at any time, and may be raised by the court *sua sponte*. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). A judgment rendered in a case over which the court lacked subject matter jurisdiction is a nullity, and may be vacated at any time.

The principle statutory bases of federal jurisdiction are general federal question jurisdiction under 28 U.S.C. §1331 and diversity of citizenship under 28 U.S.C. §1332. In addition, there are a number of less frequently used grants of

general jurisdiction, as well as specific grants of jurisdiction in federal legislative schemes.

1. Federal Question Jurisdiction

28 U.S.C. §1331 grants general federal question jurisdiction to the federal courts:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

To "arise under" the Constitution, etc., the claim must in some substantial way be based on federal law. As stated by Justice Cardozo, for a case to "arise under" federal law "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action," and "[t]he right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully v. First Nat'l. Bank*, 299 U.S. 109 (1936). The federal nature of the controversy must appear from the nature of the affirmative allegations in the complaint; the framing of a complaint to anticipate a federal defense is insufficient. *Railroad Co. v. Mississippi,* 102 U.S. 135 (1990); *Louisville & Nashville R. Co. v. Mottley, supra*. A patently frivolous, or obviously insubstantial federal claim will not confer jurisdiction. But the assertion of a federal claim, which is ultimately rejected on the merits, will not defeat federal jurisdiction under §1331. *Bell v. Hood*, 327 U.S. 678 (1946).

2. Diversity Jurisdiction

28 U.S.C. §1332(a) provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between --

(1) citizens of different states;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state. . . as plaintiff and citizens of a State or of different States."

a. Complete Diversity Required

No plaintiff may be a citizen of any state of which any defendant is a citizen. *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806).

1) Realignment

In determining whether diversity exists, the court is not bound by the formal alignment of parties in the pleadings but will realign the parties according to their true interests. *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941).

2) As of When Diversity Must Exist

Diversity is determined as of the time the action is commenced. *Smith v. Sperling*, 354 U.S. 91 (1957). Once jurisdiction attaches, it is not defeated by a subsequent change in the citizenship of one of the parties or the substitution of a non-diverse representative if a party dies, *Grady v. Irvine*, 254 F.2d 224 (4th Cir.1957) cert. denied, 358 U.S. 819 (1958), or by the intervention as of right of a

non-diverse party. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968); *see* 28 USC §1367(b).

3) Improper or Collusive Joinder

Jurisdiction does not extend to cases where a party, "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction", of the court. 28 U.S.C. §1359. Sham assignments and the appointment of representative parties for the sole purpose of creating diversity will be disregarded. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969).

4) Indispensable Parties

Indispensable parties must be considered, but otherwise persons not joined may be disregarded, in determining diversity. *Weaver v. Marcus*, 165 F.2d 862 (4th Cir. 1948). Non-diverse parties whose presence is not essential may be dropped to create the requisite diversity, in the court's discretion. *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 691 (4th Cir. 1978).

b. Amount In Controversy

1) Generally

The valuation of the amount in controversy is determined from the standpoint of the plaintiff's view of the facts. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1937). It is not the amount claimed in the *ad damnum* which controls, but the amount reasonably in controversy under the good faith allegations of the complaint. The complaint must contain an allegation of the jurisdictional amount. The jurisdictional amount is exclusive of interest and costs,

but may include punitive damages if claimed and recoverable under the allegations of the complaint. *Bell v. Preferred Life Assurance Society*, 320 U.S. 238 (1943).

2) Suits for Non-Monetary Relief

If an action filed in federal court solely on the basis of diversity is such that monetary valuation is impossible, then there is no jurisdiction. *Rappoport v. Rappoport*, 416 F.2d 41 (9th Cir. 1969). But mere difficulty of ascertainment of the amount will not defeat jurisdiction. *Wiley v. Sinkler*, 179 U.S. 58 (1900). In such cases the court must exercise its best judgment to assess the possibility of value greater than the jurisdictional amount. In an equitable action, the jurisdictional amount is to be determined from the value of the object to be obtained by the plaintiff. *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121 (1915). Actions for injunctive relief are measured by the value, from the plaintiff's standpoint, of the right to be enforced. *Hunt v. New York Cotton Exchange*, 205 U.S. 322 (1907).

3) Aggregation of Claims

To determine the amount in controversy, the plaintiff may aggregate all of his claims against a single defendant. *Alberty v. Western Surety Co.*, 294 F.2d 537 (10th Cir. 1957). Where there is more than one defendant, the claims may be aggregated if their claimed liability is joint. *Litvak Meat Co. v. Baker*, 446 F.2d 329 (10th Cir. 1971). Where the liability is several, then the jurisdictional amount must be sustained as to each defendant. *Motorists Mutual Insurance Co. v. Simpson*, 404 F.2d 511 (7th Cir. 1968) cert. den. 394 U.S. 988 (1969).

Where two or more plaintiffs join in an action, and their claims are separate and distinct, the amounts in controversy may not be aggregated. Where several plaintiffs unite to enforce a single claim in which they have a joint, undivided interest, the collective value of the claim is the pertinent value. *Pinel v. Pinel*, 240 U.S. 694 (1916).

In class actions, the value of the claims of the plaintiff class cannot be aggregated, unless the right asserted is jointly held. *Snyder v. Harris*, 394 U.S. 332 (1969). There is, however, a split in the circuits as to the necessity that all plaintiffs assert injuries in the jurisdictional amount. Under the reasoning of one group of circuits, if one of the plaintiffs in a class action meets the jurisdictional amount, then the court may exercise supplemental jurisdiction under 28 U.S.C. §1367 over the remainder. *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001).

4) Failure to Recover Jurisdictional Amount

28 U.S.C. §1332(b) provides:

> "Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

c. Determination of Citizenship

1) Natural Persons

To be a citizen of a state, a person must be a U.S. citizen and domiciled in the state. The more rigorous test of domicile is used, not mere residence. *Robertson v.*

Cease, 97 U.S. 646 (1878). The jurisdictional allegation must be in terms of citizenship, not residence. *Luehrs v. Utah Home Fire Ins. Co.* 450 F.2d 452 (9th Cir. 1971).

2) <u>Corporations</u>

28 U.S.C. §1332(c) provides:

For the purposes of this section and section 1441 of this title --

> (1) A corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Thus, a corporation may be a citizen of more than one state. This section was amended in 1988 to add the provision concerning a direct action against any insurer. This provision further restricts diversity jurisdiction by requiring not only diversity of the plaintiff and the insurer, but also of the plaintiff and the nominal defendant.

The 1988 amendment was strictly construed in *Northbrook National Insurance Co. v. Brewer*, 493 U.S. 6, 107 L.Ed. 2d 223 (1990). There, a workers' compensation insurer sued its insured pursuant to the provisions of Texas statutes providing for review of determinations of the workers' compensation board. The insurer and insured had diverse citizenship which was the basis for federal jurisdiction. The Supreme Court rejected the insured's contention that the 1988

amendment ousted the federal court's diversity jurisdiction. The court held that the amendment dealt only with a direct action against an insurer, whereas this case involved an action brought by the insurer.

3) Partnerships and Unincorporated Associations

These are entities which are citizens of every state of which a member is a citizen. *Belle View Apartments v. Realty Fund Trust*, 602 F.2d 668 (4th Cir. 1965). In *Carden v. Arkoma Associates*, 494 U.S. 185, 108 L.Ed.2d. 157 (1990), the Supreme Court held that even in limited partnerships, all of the limited and general partners must be considered for the purpose of determining diversity jurisdiction. In *Freeport McMoRan, Inc. v. KN Energy, Inc.*, 498 US 426, 112 L.Ed 2d 951 (1991), the court held that the addition of a limited partnership which included non-diverse parties would not defeat diversity jurisdiction where the original parties were diverse.

4) Governmental Entities

States and State agencies are not citizens for purposes of diversity jurisdiction. *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894). Counties and municipal corporations are. *Moor v. County of Alameda*, 411 U.S. 693 (1973). The United States is not. *Darling v. United States*, 352 F.Supp. 5656 (E.D. Calif. 1972).

5) Representative Parties

The 1988 amendments to 28 U.S.C. §1332 also changed the prior law regarding representative parties. Under the amendment, the representative of the

estate of a decedent, or of an infant or incompetent person, is deemed to be a citizen of the state of the decedent or of the represented person.

6) Class Actions

Only the citizenship of the named class representative is considered. *Sero v. Preiser*, 506 F.2d 1115 (2nd Cir. 1974).

7) Derivative Suits

There are three parties to shareholder derivative suits: the shareholder plaintiff, the corporation, and the defendant against whom the plaintiff asserts a claim on behalf of the corporation. The corporation is treated as a defendant if its position is antagonistic to the plaintiff's, and as a plaintiff if it is not. See *Smith v. Sperling*, 354 U.S. 91 (1957).

8) Interpleader

Under 28 U.S.C. §1335, interpleader is available where there is diversity between the interpleaded defendants, regardless of the citizenship of the plaintiff stakeholder.

d. Choice of Law

Diversity cases are governed by the substantive law (including conflicts of laws) of the forum state. Procedural rules are governed by federal law. This is not limited to the Federal Rules of Civil Procedure, but extends to any law which can be characterized as procedural as opposed to substantive. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974).

3. Other Specific Grants of Federal Jurisdiction

In addition to the general federal question jurisdiction conferred by 28 U.S.C. §1331, there is a variety of specific federal statutory schemes which provide for federal court jurisdiction. These include:

i. Admiralty and maritime cases.
28 U.S.C. §1333.

ii. Bankruptcy proceedings.
28 U.S.C. §1334.

iii. Most civil actions arising under Acts of Congress regulating commerce or protecting trade or commerce against restraints and monopolies.
28 U.S.C. §1337.

iv. Civil actions arising under acts of Congress relating to patents, plant variety protection, copy-rights and trademarks.
28 U.S.C. §1338.

v. Certain actions arising under federal revenue laws.
28 U.S.C. §1340.

vi. Most civil rights actions.
28 U.S.C. §1343.

vii. Habeas corpus.
28 U.S.C. §2254.

viii. Actions in which the United States is a plaintiff or defendant.
28 U.S.C. §§1345, 1346.

4. Supplemental Jurisdiction

As the law of jurisdiction developed, it was determined that a federal court that has jurisdiction of a case generally had "ancillary jurisdiction" to decide

"peripheral aspects of a controversy that by themselves would not be cognizable in federal court." *Bay Guardian Co. v. Chronicle Pub. Co.*, 340 F.Supp. 76, 79 (N.D. Cal. 1972). When the complaint establishes federal jurisdiction, the court was considered to have ancillary jurisdiction of any compulsory counterclaim under F.R.C.P. 13(a) (a counterclaim arising from the same transaction). *H.L. Peterson Co. v. Applewhite*, 383 F.2d 430 (5th Cir. 1967). Jurisdiction continued even if the plaintiff's claim is defeated on the merits, but not if the complaint is dismissed for want of jurisdiction unless an independent basis for federal jurisdiction of the counterclaim has been alleged. *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). Ancillary jurisdiction ordinarily did not extend to permissive counterclaims under F.R.C.P. 13(b) (claims arising out of a separate transaction), and therefore an independent basis for federal jurisdiction must be alleged in such a counterclaim. *Sue & Sam Mfg. Co. v. B-L-S Constr. Co.*, 538 F.2d 1048 (4th Cir. 1976). Jurisdiction would exist if such a counterclaim were asserted only as a set-off, however, and not as a basis for affirmative relief. *D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971).

When a federal court had jurisdiction of a federal claim, it could also entertain claims based on state law which "derive from a common nucleus of operative fact" such that the plaintiff "would ordinarily be expected" to try all the claims in a single proceeding. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). This was true although the federal court would not have jurisdiction to entertain

the state law claim independently. Such jurisdiction was called "pendent jurisdiction."

Pendent jurisdiction related only to claims, not to parties. A Federal court with jurisdiction over parties would hear non-federal claims pendent to the federal claim on which jurisdiction was premised. But it could not hear pendent claims against parties over whom the court's jurisdiction was not established in the primary jurisdictional claim, or by some independent basis of federal jurisdiction. Hence, a federal court hearing a Federal Tort Claims Act action could not extend pendent jurisdiction over a private, non-diverse defendant, even when the actions clearly derive from a common nucleus of operative fact. *Finley v. U.S.*, 490 U.S. 545 (1989).

In 1990, Congress enacted 28 USC §1367 to reverse the effect of *Finley v. U.S., supra.* That statute reads as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such

claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Thus, "[s]upplemental jurisdiction allows a federal court to hear both state and federal claims if they would ordinarily be expected to be tried in one judicial proceeding." *Arruda v. Sears, Roebuck & Co.*, 273 B.R. 332 (D.R.I. 2002). The district court can decide the state law question first and thereby avoid passing on the federal question, and it can also decide the state law question even if it rejects the federal claim on the merits. *Hagans v. Lavine*, 415 U.S. 528 (1974); *Silver v. Louisville & N.R. Co.*, 213 U.S. 175 (1909). However, if the federal claims are dismissed prior to trial, the state law claim may be dismissed without prejudice, to

be adjudicated in state court. *United Mine Workers v. Gibbs, supra*. Such dismissal is discretionary, however, *see Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226 (9th Cir. 1976), cert. denied, 430 U.S. 915 (1977).

5. Multiparty, Multiforum Jurisdiction

Congress considerably expanded the scope of diversity jurisdiction in certain instances in 28 USC §1369, Multiparty, Multiforum Jurisdiction, which became effective in 2002. This statute provides for federal jurisdiction for litigation arising out of a single accident in which at least 75 persons died. There are several qualifications that must be met in order for multiparty jurisdiction to be invoked, which are set forth in the statute. Of principal note is the adoption in the statute of a new concept, "minimal diversity," which is defined as existing "if any party is a citizen of a State and any adverse party is a citizen of another State,...." That is, the statute specifically disavows the complete diversity requirement of *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806) for cases that meet statute's criteria. Congress enacted § 1369 "to create a mechanism whereby litigation stemming from one major disaster could easily be consolidated in one federal court for discovery and trial." *Passa v. Derderian*, 308 F.Supp.2d 43, 53-54 (D.R.I. 2003). Congress also intended to "promote judicial efficiency while avoiding multiple lawsuits concerning the same subject matter strewn throughout the country in various state and federal courts." *Id*.

The statute, however, limits the jurisdiction of district courts under multiparty, multiforum jurisdiction: "The district court shall abstain from hearing

any civil action described in subsection (a) in which - - (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State." 28 U.S.C. § 1369(b). In the Station Fire cases, Senior District Judge Lagueux held that § 1369(b) "should be read as a mandatory abstention clause limiting the exercise of federal jurisdiction." *Passa v. Derderian*, 308 F.Supp.2d 43, 56 (D.R.I. 2003). Judge Lagueux also held that "in light of the legislative history of § 1369, any interpretation of "all plaintiffs" under the statute must include all potential plaintiffs, meaning all those who have died or suffered injury as a result of the tragedy at issue." *Id*. at 60. Finally, Judge Lagueux held that the phrase "primary defendants" under the statute "must include those parties facing direct liability in the instant litigation," as opposed to theories of vicarious liability, indemnification or contribution, which have a "secondary" relationship to the litigation. *Id*. at 62-63.

6. <u>Removal</u>

Defendants also may initiate the invoking of the jurisdiction of the federal court, through the process known as removal. Removal is a device whereby cases over which the federal courts would otherwise have jurisdiction, but which were brought in state court, may be transferred to federal court at the initiative of the defendant. Removal is pursuant to and governed by statute, 28 U.S.C. §§1441-1452. The removal statutes are strictly construed, and, in general, against the right of removal. *American Fire and Casualty Co. v. Finn*, 341 U.S. 6 (1951); *Shamrock Oil*

& Gas Corp. v. Sheets, 313 U.S. 100 (1941). Removal is for trial-level proceedings, and is not an appellate process.

a. Types of Cases Which Can Be Removed

1) Civil Cases

28 U.S.C. §1441 on its face refers only to civil actions. Only those criminal actions specified by other statutes may be removed. Construction of what is a civil action is determined by federal, not state law. *Shamrock Oil & Gas Corp. v. Sheets*, *supra*. While removal jurisdiction at one time was derivative of the jurisdiction of the state court in which the action was filed, that was changed by legislative amendment. The federal court will have jurisdiction over a case properly removed to it even if the state court in which it was initially brought did not have that jurisdiction. The case must be an independent suit, not a proceeding supplementary or incidental to another suit. *Bank v. Turnbull*, 16 Wall. 190 (1873).

28 U.S.C. §1441(c) provides:

> "Whenever a separate and independent claim or cause of action, within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates."

2) Diversity Cases

A case in which there exists diversity of citizenship between plaintiffs and defendants may be removed, except that a defendant which is a citizen of the state in which the action is brought may not obtain removal. 28 U.S.C. §1441(b). The jurisdictional amount in controversy must be present along with the other requisite

elements of diversity jurisdiction. Cases in which there were fictitious name defendants presented a problem for removal. Since all defendants must join to effect removal, the presence of a fictitious defendant defeats removal. *Bryant v. Ford Motor Co.* 844 F.2d 602 (9th Cir. 1987). That decision was mooted by the 1988 amendment to 28 U.S.C. §1441, which specifically exempted fictitious name defendants from consideration in removal.

In *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), the defendant removed a case to federal court, based on diversity jurisdiction, at a time when a non-diverse party was still in the case (although the plaintiff had settled with that defendant). The district court denied the plaintiff's motion to remand, and the case proceeded to trial. At the time that judgment was entered in the district court, diversity jurisdiction unquestionably existed. The Supreme Court held that the judgment would be allowed to stand, notwithstanding that the district court's denial of the remand motion was error. Considerations of judicial economy prevailed over the technical violation of the statutory procedure.

3) Federal Question Cases

The provisions of 28 U.S.C. §1331 apply. The claim arising under the constitution, etc. of the United States must appear as an essential element in the allegations of the complaint. Insertion of a federal question in the answer or a counterclaim will not suffice.

4) Other Cases

Removal may also be obtained of civil and criminal actions involving federal officers (28 U.S.C. §1442), and members of the armed forces (28 U.S.C. §1442a), when the conduct alleged was undertaken under color of office or status. Also, a defendant sued or prosecuted in state court for activity protected under a law providing for racial equality, where the rights under the law cannot be enforced in state courts, may remove the action to federal court. 28 U.S.C. §1443.

b. Procedure for Removal

Removal is effected by the filing of a notice of removal setting forth the grounds for removal, together with a copy of all process, pleadings, and orders served on the defendant(s) in the state action, in the federal court for the district and division where the state court action is pending. The notice must be filed within thirty days after receipt by the defendant of the complaint, or within thirty days of arraignment, as the case may be. The time for petitioning for removal of criminal cases may be extended. All of the defendants, except nominal or formal parties, must join in the petition to remove. *McKinney v. Rodney C. Hunt Co.*, 464 F.Supp. 59 (W.D.N.C., 1978). If the original complaint does not set forth a basis for removal, but the complaint is thereafter amended in such a way as to make it removable, then the defendant(s) must file the notice of removal within thirty days of receipt by defendant(s) of the amended pleading. However, a case that comes within the court's diversity jurisdiction may in no event be removed more than one year after commencement of the action.

c. Effect of Removal

Upon filing of the notice with the federal court, the defendants are to file a copy with the state court. The state court is then to transfer the case to federal court, and take no further action thereon. The pleadings which were filed in the state court are recognized by the federal court; any interlocutory orders entered by the state court will remain in effect until modified or vacated by the federal court. 28 U.S.C. §1450.

d. Remand

The procedure to defeat removal is a motion for remand, which would contest the grounds for removal stated in the notice. If based on a defect in the procedure of removal, it must be made within 30 days of filing of the notice of removal. 28 U.S.C. §1446 states that signing the notice is subject to Rule 11; §1447 allows for the award of costs, including attorney fees, with an order of remand. Removal jurisdiction is based on the facts as of the time of removal. Subsequent amendment of the complaint to eliminate the basis for federal jurisdiction will not be a basis for remand. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). However, "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to state court." 28 U.S.C. §1447(e). This 1988 amendment allows the district court no discretion to continue to entertain a removed diversity action if post-removal additional defendants destroy diversity. Remand orders are not reviewable except that an order remanding a case to the

State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. 28 U.S.C. §1447 (d).

III. LIMITATIONS ON JURISDICTION

A. Eleventh Amendment

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite the clear language to the contrary, the Eleventh Amendment in application bars suits against a state in federal court both by citizens of other states as well as by citizens of the state being sued. *Hans v. Louisiana*, 134 U.S. 1 (1890) The Eleventh Amendment will apply to bar a suit even if the defendant is not the state *per se.* If a suit between private parties seeks to impose a liability which must be paid from public funds in the state treasury, it is subject to the Eleventh Amendment and may not be brought in federal court. Hence, an action against a state officer on his official capacity comes within the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974) On the other hand, an action against a state official in his individual capacity does not implicate the Eleventh Amendment. *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981) aff'd. 460 U.S. 719 (1983).

The Eleventh Amendment immunizes states against actions in federal court for damages. It does not protect states from federal actions seeking injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908). The line between the two is not always

clear. Thus, an equitable remedy in the form of payment of withheld welfare benefits is in the nature of damages, and barred by the Eleventh Amendment. *Edleman v.Jordan, supra.* On the other hand, an equitable remedy requiring a state to expend its funds to send a class of citizens notification of their rights under state law to seek payment of past withheld benefits is not. *Quern v. Jordan,* 440 U.S. 332 (1979). The apparent dividing line is between retroactive relief (barred) and prospective remedy (allowed).

Eleventh Amendment immunity is not immutable. It may be waived by a state. Waiver will be found only "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan, supra,* quoting *Murray v. Wilson Distilling Company,* 213 U.S. 151 (1909). The Rhode Island Supreme Court has held that this state's tort claims act, R.I. Gen. Laws §9-31-1, constitutes a waiver of Eleventh Amendment immunity subject to the limitation on recoverable damages. *Laird v. Chrysler Corp.,* 460 A.2d 425 (R.I. 1983).

Eleventh Amendment immunity may also be abrogated by Congressional action. Section 5 of the Fourteenth Amendment authorizes Congress to enact legislation enforcing the substantive guarantees of that Amendment. Where the ensuing legislation is unambiguous in its intent to subject states to liability, that legislation will prevail in the face of the Eleventh Amendment. *Fitzpatrick v.* Bitzer, 427 U.S. 445 (1976). Title VII of the Civil Rights Act of 1964 (as amended in 1972) is such an enactment. *Id.* 42 USC §1983 is not. *Edelman v. Jordan, supra.*

Congress may also abrogate states' Eleventh Amendment immunity pursuant to its powers under the Commerce Clause. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

States' Eleventh Amendment protections have undergone recent expansion by the United States Supreme Court. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the court held that the Eleventh Amendment barred a state from being sued in federal court to enforce the federal Indian Gaming Regulation Act. In *Alden v. Maine*, 527 U.S. 706 (1999), the court barred state employees from suing the sovereign state in state court under the federal Fair Labor Standards Act. In *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002), the court applied the Eleventh Amendment to an administrative proceeding before a federal agency (despite the clear wording of the amendment itself as applying only to the "judicial power of the United States." And, in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), the court held that the extension of the period of limitations for bringing actions, provided for in subsection (d) of the supplemental jurisdiction statute, 28 U.S.C. §1367, could not be applied to resurrect a claim against a state.

B. Abstention

1. General Principles

There are certain categories of cases in which there is reluctance of the federal court to exercise jurisdiction even though the requisites of jurisdiction are met. The reluctance flows from the nature of the federal system, and conflicting

principles of jurisprudence: federal courts are obligated to decide cases properly within their jurisdiction; decision of constitutional issues should be avoided when possible; conflict between state and federal systems should be minimized. See 1A-Pt. 2 Moore, Federal Practice, Para. 0.203, p. 2101. The abstention doctrine has been refined over the years into three categories, the *Pullman* abstention, the *Burford* abstention, and the *Younger v. Harris* abstention.

2. Pullman Abstention

Reluctance to decide constitutional issues when other grounds are available yields a tendency to decide cases where possible on state law grounds. When the action is brought in federal court, however, and state law on the issue is unclear, the federal court may decide the issue wrongly. In these circumstances, the federal court should abstain from deciding the case, and allow the state law issue to be decided by the state courts. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Fundamental to a Pullman abstention is that state law is unclear. The two further elements are that the issue involves a sensitive area of social policy on which the federal court should not enter unless no alternative is available, and that a definitive ruling on the state law issue would obviate ruling on the constitutional issue.

3. Burford Abstention

The essence of the Burford abstention is that the case involves highly complex matters, generally in a regulated industry, in which there is a predominant state interest and there is available in the state adequate and expeditious means for

adjudication and review. *Burford v. Sun Oil Co.*, 320 U.S. 228 (1843). Like *Pullman*, there must be an unsettled question of state law. Unlike *Pullman*, however, it is not necessary for invoking the doctrine that a constitutional issue be avoided. The hallmark of *Burford* abstention is unsettled state law on a question in which the state has a substantial interest in a field of highly regulated commerce.

4. ***Younger v. Harris* Abstention**

Ordinarily, an ongoing state criminal proceeding may not be interfered with by a federal court. *Younger v. Harris*, 401 U.S. 37 (1971). This decision complements the general prohibition contained in 28 U.S.C. §2283 against enjoining pending state court proceedings. *Younger* applies only if there is an ongoing state proceeding. It does not bar a federal court from enjoining enforcement of a state law when action is only threatened, and does not bar a challenge to a state law if there is no criminal proceeding imminent. However, there must be a case or controversy. *Steffel v. Thompson*, 415 U.S. 452 (1974). *Younger* also applies only to those federal plaintiffs who actually are parties to the state proceedings. It does not apply to others who may be similarly situated. *Women's Services, P.C. v. Douglas*, 653 F.2d 355 (9th Cir. 1981). *Younger* also does not bar injunctions against bad faith criminal prosecution, or criminal proceedings in which the federal right cannot be adjudicated. *Gerstein v. Puch*, 420 U.S. 103 (1975).

C. Justiciability

Under Article III, the judicial power of the United States extends only to "cases" and "controversies." A cause is not justiciable, within the judicial power,

unless it presents a case or controversy. There are certain indicia which characterize a case or controversy:

1. Adverse Parties

Parties must be adverse. Friendly or collusive suits are not allowed. Courts do not render advisory opinions. *Muskrat v. United States*, 219 U.S. 346 (1911).

2. Standing

Parties must have a substantial stake in the outcome (standing) sufficient "to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978).

3. Live, Ripe Controversy

The controversy must be live and ripe, not academic or moot. *A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp.*, 559 F.2d 928 (4th Cir. 1977).

4. Political Questions

Due regard for the separation of powers requires courts to avoid deciding "political questions." *Gilligan v. Morgan*, 413 U.S. 1 (1973).

5. Statutory Restrictions

a. Tax cases

28 U.S.C. §1341 prohibits federal courts from enjoining the assessment, levy, or collection of taxes under state law where a plain, speedy, and efficient remedy may be had in the state's courts.

b. Public Utilities Cases

28 U.S.C. §1342 prohibits federal courts from interfering with state regulatory orders affecting the rates charged by a public utility where the order is issued after notice and hearing, there is remedy provided under state law, the order does not interfere with interstate commerce, and the sole basis for jurisdiction is diversity or repugnance of the order to the U.S. Constitution.

c. Labor Cases

The Norris-LaGuardia Act, 29 U.S.C. §§101-115, prohibits federal courts from issuing injunctions in most labor disputes. The prohibition is subject to some exceptions, notably for violent strikes.